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OFFICE OF GENERAL
COUNSEL

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June 26, 2008

Jeff S. Jordan, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 6006

Dear Mr. Jordan:

The undersigned represent the respondents, Friends of Bruce Lunsford and Karen Sensenbrenner, treasurer (hereinafter referred to collectively as the "committee"). This matter was generated by a complaint filed on May 2, 2008 by Steve Robertson, the chairman of the Republican Party of Kentucky. Mr. Robertson alleged that the committee paid for a television infomercial supporting the candidacy of Bruce Lunsford that failed to include an oral and written disclaimer in violation of 11 CFR § 110.11(c)(3)(ii) and (iii).

As described below, Mr. Lunsford and the other candidates in the Democratic senatorial primary were invited to be interviewed on a regularly scheduled local morning news show. The candidates were offered an opportunity to extend their interview from four to eight minutes for \$200. Although this seemed like an unorthodox request, the committee paid the \$200 fee in response to the television station's solicitation. Because the television station maintained total control of the segment, including the interviewer and the questions, its broadcast was a news story exempt from the definitions of a public communication and electioneering communication. Accordingly, no disclaimer was required. Moreover, there was substantial compliance with the Commission's disclaimer requirements even though it was impracticable to comply exactly with those requirements. Even if, *arguendo*, there was a technical violation, because the fee to extend the interview was *de minimus*, this should be a low rated case that does not warrant the expenditure of Commission enforcement resources. Accordingly, the complaint should be dismissed and this matter should be closed.

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FACTS

On April 8, 2008, the committee received an unsolicited email from Michael Sizemore, an account executive at WBKI-TV. The email was sent to Emily Bergman at the committee and was addressed to "Candidates." The committee believes that this email was sent to all of the Democratic candidates participating in the May 20, 2008 primary election for the Democratic Party's nomination for the Senate. The broadcaster offered the "Candidates" an opportunity to appear on The CW Louisville Live This Morning cable television show broadcast on WBKI. This is a half hour morning broadcast that "highlight[s] local events, artists and news from the Louisville metro area." www.cwlouisville.com/schedule. The email stated:

Hello candidates!

With May 6th approaching fast we would like to offer you and appearance on The CW Louisville Live This Morning.

As the country faces one of the most turbulent times in its history, political discourse has never been more important. With threats of tax increases, gas prices sky rocketing and the scare of recession, the local political race has become more important than ever. To help further the discussion, The CW Louisville Live This Morning will spend time discussing the current political climate. We will meet the incumbents, the candidates running against them, and the important issues the public needs to know about.

As an interactive show, guests will have the ability to answer questions directly from the public about the topics most important to them.

Each guest will receive a four-minute segment to discuss the issues and where they stand. The segment with host, Dan Spangler, will be fast-paced and informative. The interview will give each candidate a chance to state their views and how they will be able to help the community.

The cost to appear on "Louisville Live This Morning" is only \$200 for the 4 minute segment.

The morning show airs Monday through Friday from 9:30-10AM. If you are interested in appearing on the show, please contact me by email at msizemore@wbki.tv or by phone at 812-573-3527.

Thanks.

See Attachment 1 . A telephone call to the station confirmed that the invitation was sent to all Democratic primary candidates. However, the email incorrectly stated the cost. There would not be any fee to appear for a four minute interview segment, but the candidate could appear for an eight minute interview segment for a \$200 fee. Attachment 2 . The committee was invited to submit a list of suggested questions. It was unusual for a news interview show to ask for any fee to appear, but it was not unusual for the candidate to submit a list of proposed questions. The committee decided to pay the \$200 fee for more interview time, Attachment 3, and submitted a list of questions, Attachment 4.

The broadcaster did not send an invoice to the committee. Indeed, the broadcaster did not have a published fee for the extension of the interview as it does for advertisements.

On April 21, 2008, Mr. Lunsford appeared live on The CW Louisville Live This Morning show and was interviewed by the host about topics he thought would be of interest to his audience. He ignored the questions submitted by the committee. The cable broadcast timing, participants and content were controlled by the broadcaster. Neither Mr. Lunsford nor the committee exercised any editorial control over the questions, comments by the interviewer or any other aspect of the interview. Even if, *arguendo*, the committee wanted broadcast a written disclaimer, the broadcaster did not give them the opportunity to do so. Of course, as described below, the interviewer stated, that the Lunsford campaign paid for the additional time at the end of the interview.

DISCUSSION

I. The Complaint Should Be Dismissed Because The Broadcast Interview Is A News Story Exempt From Disclaimer Requirement.

This appears to be the first time that the Commission is being asked to address the situation where a broadcast live interview of a candidate on a regularly scheduled news program has been extended for a *de minimus* fee. There should be no question that the first four minutes of the interview did not involve a fee, and therefore there is no question that the disclaimer regulations do not apply to the first half of the interview. "The legislative history on the press exemption is sparse; the House of Representatives' Report on this section states merely that the exemption was designed to 'make it plain that it is not the intent of Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.' H. R. Rep. No. 93-1239, p. 4 (1974). *Fed. Election Com. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (U.S. 1986). The Supreme Court has "consistently recognized the unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.' [*First Nat'l Bank v.*] *Bellotti*, 435 U.S. [765,] 781 (1978). See also *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ('[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve'). The Act's definition of 'expenditure,' § 169.206, conceivably could be interpreted to encompass election-related news stories and editorials." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 668 (U.S. 1990). However, the press exemption makes clear that the definition of expenditure for public communications and electioneering messages do not apply to *bona fide* news stories such as the interview described in the complaint.

There is no distinction between the first four minutes of the interview and the last three. Indeed, there was one continuous interview. Mr. Lunsford answered questions posed by the host. Mr. Lunsford had no control over the questions, the setting or the timing of the broadcast. Furthermore, the broadcaster maintained total control of the broadcast including editorial control. Even though the campaign had submitted proposed questions, they were ignored by the host who asked his own questions without consulting the campaign or Mr. Lunsford. Therefore, the press exemption for expenditures, 2 U.S.C. § 431(9)(B), applies equally to the first four and the last three minutes of the interview. The interview was a "news story ... distributed through the

facilities of [a] broadcasting station" not "owned or controlled" by Mr. Lunsford., directly or indirectly. *Id.* Thus the disclaimer requirement for paid political advertising, where the candidate or a political committee controls the content of the broadcast message, does not apply. Accordingly, the complaint should be dismissed.

II. The Complaint Should Be Dismissed Because It Was Impracticable To Comply Exactly With The Disclaimer Requirement, And There Was Substantial Compliance With The Disclaimer Requirement.

The Commission's disclaimer regulations, 11 CFR § 110.11, also known as the "Stand By Your Ad" regulations requires television advertisements to "include a statement that identifies the candidate and states that he or she has approved the communication," and the statement must be made both orally by the candidate and in writing. 11 CFR § 110.11(c)(3)(ii). As explained by Senator Wyden, one of the sponsors of the requirement:

I offered this proposal with our friend and colleague, Senator Susan Collins of Maine. It is called the stand by your ad requirement. It is a significant step forward in promoting accountability in the political process. It will provide a meaningful step to slow the corrosion of the political process and essentially the corrosion that springs from a lack of Federal responsibility when Federal candidates take to the airwaves to win elections but do not want to be held accountable. . . .

Candidates can say anything they please. They just have to personally stand by their remarks to get the discount. They can say anything they want, however farfetched and however extreme. As long as it is allowed under Federal law, they can still say it. To get the discount, if they are going to attack their opponent- of course, that is almost invariably what happens when you mention an opponent in an ad-they have to stand by that ad and personally be held accountable. . . .

I believe the stand-by-your-ad proposal, which holds candidates accountable, and which I was honored to have a chance to work with Senator Collins of Maine, is going to help clean up campaigns. It is going to help make candidates more accountable and make the politics and political discourse in this country more positive and more open.

Congressional Record, S2174 March 20, 2002. The commission has repeatedly looked to compliance with the spirit of this provision rather than requiring a mechanistic application of specific words in specific places. In fact, the Commission's own regulation recognizes that there are situations when it would be impracticable to comply exactly with its own stand by your ad regulations. 11 CFR § 110.11(f)(ii).

The Commission has repeatedly taken a broad view of its disclaimer exception, 11 CFR § 110.11(f)(ii), for situations where it would be impracticable to comply exactly with the disclaimer requirements such as skywriting, water towers and wearing apparel. In Advisory

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Opinions 2004-1 and 2004-10, the Commission opined on two different televised political advertisements that did not comply exactly with the disclaimer requirements described in 11 CFR § 110.11(b)(3)(ii). In both Opinions, "the Commission conclude[d] that a disclaimer [was] required, but that it would be permissible" to use an approach not specified by the regulation if (1) it was impracticable to comply exactly with the regulation and (2) the "approach is practicable and as faithful as possible to the 'stand by your ad' statute while avoiding unnecessary burdens on political speech that could result from a rigid application of all disclaimer provisions in all instances." AO 2004-10 at 3. For example, (1) a broadcaster's reporter could say the disclaimer for the candidate, see AO 2004-10, (2) one candidate could speak for himself and another candidate, see AO 2004-1, (3) one disclaimer stating that all the featured candidates paid for an advertisement instead of many individual disclaimers for each candidate, see AO 1994-13, no written disclaimer was required for advertisements on small telephone video screens, see AO 2002-09.

The Commission has exercised prosecutorial discretion and dismissed complaints when there was substantial compliance with the disclaimer requirements. The Commission dismissed the complaint in ADR 347/MUR 5727; "[t]he Commission reasoned that the written statement in question would be superfluous when the candidate committee has already disclosed that it 'Paid for' the advertisements, and the candidate has orally stated that he or she approved them." MUR 5629 General Counsel's Report at 4. Again in MUR 5834, the Commission dismissed a complaint where the candidate committee omitted the "requisite written statement" for the "stand by your ad" disclaimer in five advertisements, but where the advertisements stated that the committee paid for the advertisement, included the "appropriate verbal statements," and the candidate himself appeared. *Id.* Similarly, the General Counsel opined that the disclaimer requirement for advertisements paid for by other persons than the candidate do not have to comply exactly with the examples in the regulation. See MUR 5556 General Counsel's Report at 5.

Although Mr. Lunsford's interview was not a paid political advertisement where the candidate controls the content of the broadcast, nevertheless there was substantial compliance with the disclaimer regulations, particularly considering the practicability of complying with them in this situation. First, and most importantly, Mr. Lunsford himself appeared live and responded to the host's questions. Thus, he certainly approved all of his remarks -- there was no need to say he approved the contents of the broadcast because they were his own statements. He had no control of and therefore could not approve the remarks of the host. Second, the host announced that the Lunsford campaign had made a payment so that it was unnecessary for Mr. Lunsford to do so. Finally, it was impracticable for the campaign to include a written disclaimer because it did not have control of the broadcast, and there was no place to run a written disclaimer because the interview was part of a live half hour program and not a paid infomercial that has a beginning and an end independent of other television programming. The interview was continuous and therefore it would have been impracticable to provide a disclaimer for half of an interview. Accordingly, there was no violation of the Commission's disclaimer regulations and the complaint should be dismissed.

III. Even If There Was A Violation, It Was *De Minimus* And The Complaint Should Be Dismissed.

The campaign responded to a solicitation from the television station and paid \$200 to extend one interview four minutes. In view of the above description of the news storey exception, the impracticability exception and the substantial compliance, even if there were a violation, it was *de minimus*, and the complaint should be dismissed. For example, in MUR 5556 a candidate committee failed to include a written disclaimer in broadcast advertisements that ran 127 times on seven radio stations. The Commission rejected a signed conciliation agreement and stated, "Had we known at the reason to believe stage that the costs of the advertisements were so minimal, we would not have pursued pre-probable cause conciliation in the first place." Here too, the \$200 cost was minimal, and likewise this matter should be dismissed at the reason to believe stage.

CONCLUSION

For all of the reasons described above, the Commission should find no reason to believe any violation of the law occurred, the complaint should be dismissed, and the Commission should close the file.

Respectfully submitted,

Neil P. Reiff
Stephen E. Hershkowitz



Counsel to Friends of Bruce Lunsford, and
Karen Sensenbrenner, as Treasurer

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